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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 134 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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BAGDAJI SOGAJI MARWADI - Orig. Accused

Appellant

Versus

STATE OF GUJARAT - Respondent

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Appearance:
MR VIJAY H PATEL for Appellant
MR KG SHETH, APP for Respondent State

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CORAM : MR.JUSTICE R.K.ABICHANDANI
and
MR.JUSTICE SHARAD D.DAVE

Date of decision: 09/08/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE R.K.ABICHANDANI for the Court)

1. This appeal is directed against the judgement and order dated 3rd December 1991 passed by the learned Additional City Sessions Judge, City Sessions Court, Ahmedabad in Sessions Case No. 125 of 1991 by which the appellant - accused Bagdaji Sogaji Marvadi was convicted for offence under section 302 of the Indian Penal Code and sentenced to imprisonment for life.

2. The prosecution case was that, on 25th February 1991, at about 10.00 p.m., the accused had poured kerosene on his wife Premilaben and set her ablaze in his hut, as a result of which she died at about 1.20 a.m. in the civil hospital where she was admitted at about 11.15 p.m. The accused had, after setting her ablaze, gone away. The accused had thereafter, in the morning of 26th February 1991, reported at the police station and was arrested under the panchnama exh.31 which was drawn between 8.30 and 9.00 a.m. According to the prosecution, at the time when Premilaben was taken to the hospital, she was in a conscious state of mind and while giving the history to the medical expert, she had stated that her husband had poured kerosene on her and set her ablaze at 10.00 p.m. She had given such dying declarations before two doctors, who had recorded the same in their respective case papers. According to the prosecution, the police recorded the statement of Premilaben exh.11 in which also she had categorically stated that she was set on fire by her husband by pouring kerosene on her at 10.00 p.m. when she implored him not to drink liquor. The defence was of total denial and as per the statement of the accused under section 313 of the Criminal Procedure Code, he was not at his residence at the time of the incident, because on that day, he was invited by his relatives for dinner. When he came to know about the incident, he went to his house and found that the door was closed. He was told that his wife was taken to the civil hospital. He, therefore, went to the police station and presented himself.

3. The trial Court, on the basis of material on record, came to a finding that the death of Premilaben was homicidal and that the accused had intentionally caused her death by pouring kerosene on her and setting her ablaze. The trial Court placed reliance on the deposition of two medical experts who had stated on oath about the dying declarations made by Premilaben before them in the hospital and who have proved the papers in which they had recorded the same. The Court found that

the dying declarations made by Premilaben were reliable and that there was no possibility of her being tutored for giving such dying declarations. The incident had taken place, because, she had objected to the accused drinking liquor which he had brought in the house from outside, as stated in her dying declaration exh.11. The learned trial Judge observed that such an event could be known only to Premilaben and unless she had communicated it to the P.S.I. while giving her statement exh.11, it could not have found place therein.

4. The learned counsel appearing for the appellant contended before us that the oral dying declarations said to have been made by Premilaben before the doctor could not be relied upon by the trial Court in absence of corroboration. He submitted that there was possibility of Premilaben being tutored at the time when she was carried to the hospital in an ambulance. Moreover, by virtue of extensive burns which she had received, she could not have been in a fit state of mind to give a dying declaration before the doctors or the police officer. It was further contended that the dying declaration exh.11 recorded by the police officer could not be relied upon, because, the police officer had not asserted from the medical expert as to whether Premilaben was in a fit state of mind to give a dying declaration and no endorsement of the medical expert was obtained on the statement exh.11 recorded by him. It was further contended that the prosecution witness Vaktaji does not support the prosecution version and that, according to him, the door of the hut was broken open which shows that the accused should not have set Premilaben ablaze as he was not inside the house when Vaktaji opened the door. The learned counsel argued that merely because the medical expert had stated that the patient was conscious or well oriented, it cannot be said that she was in a fit state of mind to give a dying declaration.

4.1 The learned counsel for the appellant relied upon the following decisions in support of his contentions :

[a] The decision of the Supreme Court in Lallubhai Devchand Shah v. The State of Gujarat, reported in AIR 1972 SC 1776 was cited for the proposition that a dying declaration must be closely scrutinised as to its truthfulness like any other important piece of evidence in the light of the surrounding facts and circumstances of the case, bearing in mind, on the one hand, that the statement is by a person who has not been examined in court on oath and, on the other hand,

that the dying man is normally not likely to implicate innocent persons falsely. It was held that the person who records the dying declaration must be satisfied that the dying man was making a conscious and voluntary statement with normal understanding. In that case, the Court held that there could be hardly any doubt that Sharda was not only conscious, but able to speak out also that she was consciously and voluntarily making the statement. The Supreme Court held that, the dying declaration was a conscious statement voluntarily made by Sharda.

[b] The decision of the Supreme Court in Munnu Raja v. The State of Madhya Pradesh, reported in AIR 1976 SC 2199 was cited to point out that, in paragraph 11 of the judgement, the Supreme Court has observed that investigating officers are naturally interested in the success of the investigation and the practice of the investigating officer himself recording a dying declaration during the course of investigation ought not to be encouraged. In the same decision, the Court observed in para 5 of the judgement that, after making the statement before the police, Bahadur Singh succumbed to his injuries and therefore, the statement can be treated as a dying declaration and was admissible under section 32(1) of the Evidence Act. The maker of the statement was dead and the statement related to the cause of his death. In paragraph 6 of the judgement, the Supreme Court observed that it was well settled that though a dying declaration must be approached with caution for the reason that the maker of the statement cannot be subjected to cross-examination, there is neither a rule of law nor a rule of prudence which has hardened into a rule of law that a dying declaration cannot be acted upon unless it is corroborated.

[c] Kake Singh alias Surendra Singh v. State of Madhya Pradesh, reported in AIR 1982 SC 1021 was a case where the accused was convicted under section 304 Part II solely on the basis of a dying declaration alleged to have been made by the deceased who was burnt including a good part of his brain and in addition to the burns, other injuries inflicted by Lathis were also found on his body and there was no specific statement by the doctor holding autopsy that the deceased

after being burnt was conscious or could have made coherent statements, and still further despite enmity between the accused and the deceased according to the dying declaration the deceased readily agreed to take a round in the jeep alongwith the accused at late part of night. The Supreme Court held the accused would be entitled to acquittal as the only irresistible conclusion possible from the circumstances would be that the deceased was unconscious and never made any statement. It was held that the deceased was burnt and a good part of the brain was also burnt and therefore, the possibility was that he must have become unconscious. Moreover, the deceased had in his statement made no mention at all of other injuries which were found on his body including a fracture.

[d] The decision of the Supreme Court in Paparambaka Rosamma v. State of Andhra Pradesh, reported in AIR 1999 SC 3455 was cited for the proposition that, in the absence of medical certificate that the injured was in a fit state of mind at the time of making the declaration, it would be very much risky to accept the subjective satisfaction of a Magistrate who opined that the injured was in a fit state of mind at the time of making a declaration before him.

5. The learned Additional Public Prosecutor supporting the reasoning and findings of the learned trial Judge contended that there was reliable evidence on record to show that Premilaben was in a proper state of mind to give the dying declaration, and that she was fully conscious when she gave the oral version of the incident before two different doctors which fact was corroborated by the medical papers in which those statements were verbatim recorded by the doctors. He places reliance on the decision of the Supreme Court in Ram Bihari Yadav v. State of Bihar, reported in (1998) 4 SCC 517, in which the Supreme Court has held that the dying declaration is a substantive evidence and like any other substantive evidence, it requires no corroboration for forming basis of conviction of an accused. But then the question as to how much weight can be attached to a dying declaration is a question of fact and has to be determined on the facts of each case. It was further held that the mental condition of the maker of the declaration, alertness of mind, memory and understanding of what he is saying, are matters which can be observed by any person. But to lend assurance to those factors

having regard to the importance of the dying declaration, the certificate of a medically trained person is insisted upon. In the absence of availability of a doctor to certify these factors, if there is other evidence to show that the recorder of the statement has satisfied himself about requirements before recording the dying declaration, there is no reason as to why the dying declaration should not be accepted.

6. The incident is said to have taken place on 25-2-1991 at 10.00 p.m. in the hut of the accused in which he was residing with his wife Premilaben. The fact that Premilaben had suffered burns as a result of which she died, is clearly established from the medical evidence. Soon after the incident, she was taken to the hospital by her nephew Vaktaji and others. Vaktaji in his deposition at exh.12 has stated in paragraph 2 that Premilaben was residing with her husband Bagdaji in the said house and there was no one else residing with them. He heard the shouts of Premilaben, who was his father's sister, and on opening the door, he saw that she was burning. The people who gathered there had poured water on her and extinguished the fire and his brother telephonically called for the ambulance from the civil hospital which came in about 45 minutes and Premilaben was taken to the civil hospital by him, his brother Kantibhai and Mathurbhai. In his cross-examination, he has stated that the door of the hut was opening outwards and he had opened the same by pulling it, though earlier in the chief, he had stated that he had broke open the door. This witness did not fully support the prosecution and was allowed to be contradicted by his earlier statement before the police in which he had stated that Premilaben had told him that, because she asked her husband not to drink liquor, he got excited and had beaten her and poured kerosene on her and after setting her ablaze, had gone away. The contradiction is duly proved in the deposition of the investigating officer. The panchnama of the scene of offence exh.22 was proved in the deposition of panch witness Laxmanbhai and in that panchnama, it was specifically recorded that the door of the said house was open and that there was no mark of breaking open of the door, and it door appeared to be in its original condition. It is, therefore, obvious that the attempt of Vaktaji initially made to show that he had broken open the door, was calculated to help the accused and he himself in his cross-examination agreed that he had opened the door by just pulling it outwards. Therefore, there is no substance in the suggestion that Premilaben had locked the door from inside and set herself on fire.

7. Dr. Surendra Mahendrabhai Sharma, who was on duty, had seen Premilaben when she was brought by Vaktaji to the hospital. He asked her about her injuries and she gave the history stating that, at 10.00 p.m., husband had closed the door of the house and poured kerosene on her and set her ablaze. This was stated by her at 11.15 p.m. According to Dr. Sharma, he had noted down this history in the case papers. He has stated that she was smelling of kerosene and was burnt all over the body. He has proved the case paper at exh.15. It is recorded in the case paper exh.15 that the patient was conscious and responding to verbal commands and further that the history was given by the patient herself. The statement of Premilaben before Dr.Sharma would read in English as under :

"At about 10 o'clock, my husband had closed the door of the house from inside and poured kerosene on me and set me ablaze" (xCkgbr xSg xfkFwar xGbUnB xXkbPnB xXBT xDbm xZkbk xVQlCr xDrbuimU xIkBLmUr xXkem xZnDm.)

7.1 Thus, the version of Dr. Sharma is fully corroborated by the documentary evidence in the nature of the case paper exh.15 in which he had, at 11.15 p.m. on 25-2-1991, recorded the history in Premilaben's own words. Dr. Sharma had no reason to make any wrong noting about the history. He was discharging his duties and was not concerned with the disputes or the incident. He has denied the suggestion in his cross-examination insolently made by the counsel appearing for the accused that he had made a false noting of the history with a view to help the police, because, he was a government medical officer. There was no basis for making such insinuation and in fact, such a baseless insinuation to a medical expert ought not to have been permitted in the cross-examination, because, it amounts to suggesting that the medical officer had forged the document, which is a clear insinuation of crime, which was not at all warranted as there was no reason to make such an imputation. No such question affecting the credit of the witness could have been asked unless the person asking it had reasonable ground for thinking that the imputation which it conveys was well founded, in view of the provision of section 149 of the Evidence Act. We hold that the deposition of Dr. Surendra Sharma is thoroughly reliable and it establishes that Premilaben had made a dying declaration before him at the time when he had examined her at 11.15 p.m. on 25-2-1991 to the effect that her husband had closed the door of the house from

inside and poured kerosene on her and set her ablaze. His evidence also shows that the relatives of Premilaben were not present at the time when she made the dying declaration.

8. Dr. Anil Jitendra Amin was in the surgical ward of the civil hospital, working as a medical officer on 25-2-1991 at the relevant time when Premilaben was taken to that ward for treatment. In his deposition exh.38, he has stated that he had examined Premilaben in the emergency ward and he found that she was conscious and that she was having a proper understanding about the time, place etc. and was well oriented. He asked the patient as to how was she injured and she told him that, on that day i.e. on 25-2-1991 in the evening at 10 O'clock, her husband had poured kerosene on her at Naroda, Ahmedabad and set her ablaze. He has stated that he had noted down these words in his own handwriting in the case papers and then started the treatment. He has proved the case papers at exh.39. The case papers exh.39 fully corroborate his say. It has been recorded therein that, at 23.20 p.m. on 25-2-1991, history was given by the patient herself and that the patient was conscious and oriented while giving history. The aforesaid dying declaration made by Premilaben and recorded in case papers exh.39 would read in English as under :

"Today on 25-2-1991, my husband poured kerosene on me and set me ablaze at Naroda, Ahmedabad."

(xCkJr xQk.25.2.1991 xUk xbuJ xikBJr xSirD xfkFwar xZkbk xGbfkekCr xDrbuimU xIkBLm, xUbuNk xEkQr, xCZSkfkS, xieFkfm xSmTm.)

It is also recorded in the case papers exh.39 that she was married since 12 months. Again at the end, it was noted that the patient was conscious, cooperative, oriented and followed verbal commands. Even at 12.55 p.m., the patient's condition was noted in the case papers and it was mentioned that she was conscious. It is only after 1.05 p.m. that she became unconscious and she passed away at 1.20 a.m. as recorded in the case papers. There is absolutely no reason to doubt the version of Dr. Amin that when he inquired about her injuries, Premilaben had stated before him that her husband had poured kerosene on her at 10.00 p.m. on 25-2-1991 and set her ablaze. This doctor also had no reason to falsely implicate the accused. He has denied the suggestion that the patient had not given any history or that he had himself written down the history, a suggestion for which there was absolutely no basis. We

find the deposition of Dr. Amin to be thoroughly reliable and we hold that Premilaben did make a declaration before him to the effect that she was set ablaze by her husband after pouring kerosene on her in their house at Naroda at 10.00 p.m. on 25-2-1991.

9. The fact that Premilaben was set ablaze after pouring kerosene on her is fully corroborated by the medical evidence. The post mortem report exh.20 records the following external injuries on the body of Premilaben in column 17.

"Burns :

[1] 2nd - 3rd degree burns are present on whole face, ears, neck, eyebrows and eyelashes are burnt to roots. 2nd - 3rd decree burns are present on whole chest and upper half of abdomen. 2nd - 3rd degree burns are present on both upper limbs on all surfaces excluding palm aspect of left hand. Violet ink mark is seen on left thumb. 2nd - 3rd degree burns are present on both lower limbs excluding sole only."

9.1 It will be noted from column 19 of the post mortem report that, bruise injury was found on the scalp of Premilaben. It is described thus, "There is bruising of scalp in right frontal region of scalp size 2 x 2 cm". Dr. Ravindra Deshmukh who had performed the post mortem examination has, in his deposition exh.19, stated that Premilaben's body and her clothes were smelling of kerosene. Her hair was also smelling of kerosene. He has described the burn injuries which were noted by him and stated that all the injuries were ante mortem. On internal examination, he had found that there was bruising on her scalp of the size 2 x 2 cm. He has stated that, on seeing the nature of injuries, he was of the opinion that the burn injuries were not accidental. He has also stated that he had noted that Premilaben was in second month of her pregnancy. Her death was caused due to shock as a result of burns.

10. Thus, even without the aid of FIR exh.11 recorded by the police officer, in which the endorsement of the medical expert about Premilaben being in fit state of mind was not taken, the prosecution has been able to establish beyond any shadow of doubt from the two oral dying declarations made by Premilaben before the medical

experts as well as the medical evidence and the supporting evidence of the panchnama of scene of offence proved by the panch witness and also the report of the Forensic Science Laboratory, that it was the accused alone who had caused the death of Premilaben by pouring kerosene on her and set her ablaze on 25-2-1991 at 10.00 p.m. in his house. The conduct of the accused of not being near his wife when she had received burn injuries is significant and his excuse that he had gone to his relatives for dinner can hardly be accepted. If a relative had invited him for dinner on a festive occasion as stated by him, surely he would have taken his wife alongwith him and not left her alone in the hut. He had not even gone to the hospital to inquire about her health which would have been the conduct of an innocent person and had, instead, straightaway reported to the police station in the morning. As held by the Supreme Court in Uka Rama v. State of Rajasthan, reported in AIR 2001 SC 1814, once the Court is satisfied that the dying declaration was true, voluntary and not influenced by any extraneous consideration, it can base its conviction without any further corroboration, as the rule requiring corroboration is not a rule of law but only a rule of prudence.

11. In the above view of the matter, we fully agree with the reasoning and findings of the trial Court and hold that the accused has been rightly held guilty of the offence under section 302 of the Indian Penal Code. The appeal is, therefore, dismissed.

AUGUST 9, 2001 [R.K.ABICHANDANI, J.]

[SHARAD D. DAVE, J.]

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